Supreme Court, U. S.
FILED
SEP 16 1976
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976
No. 75-1002

JOSEPH SKILKEN AND COMPANY, *et al.*,
Petitioners,

vs.

CITY OF TOLEDO, OHIO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE, CITY OF PARMA, OHIO

ROBERT R. SOLTIS
Special Counsel
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
(216) 886-2323
Attorney for Amicus Curiae

Sponsored By:
ANDREW BOYKO
Solicitor, City of Parma, Ohio

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Table of Authorities I

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument—

Federalism Is a Cardinal Principle of Our System of Government 3

Sixth Circuit Court of Appeals' Decision Was Eminently Correct 6

Petitioners' Reliance on *Village of Arlington Heights v. Metropolitan Housing Development Corporation* Is Misplaced 8

Political Decisions Invite Political Reaction 14

Conclusion 18

TABLE OF AUTHORITIES

Cases

Berman v. Parker, 348 U.S. 26 (1954) 4

Cornelius v. City of Parma, Ohio, 374 F. Supp. 730 (N.D. Ohio 1974), *cert. denied*, March 8, 1976 (No. 75-1012) 1

Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421 (1952) 3

Driscoll v. Austintown Associates (1975), 42 Ohio St. 2d 263 7

Duryea v. City of Rolling Meadows, 119 Ill. App. 2d 445 (1970) 10

Evans v. Abney, 396 U.S. 435 (1970) 4
Ferguson v. Skrupa, 372 U.S. 726 (1963) 3
Griswold v. State of Connecticut, 381 U.S. 479 (1965) 3
Hernandez v. Texas, 347 U.S. 475 (1954) 16
Holtzman v. Schlesinger, 414 U.S. 1304 (1973) 4
Karr v. Schmidt, 401 U.S. 1201 (1971) 3
Keyes v. School District No. 1, 413 U.S. 189 (1973) 18
Lane County v. Oregon, 74 U.S. (7 Wallace) 71 (1868) 4
Lindsey v. Normet, 405 U.S. 56 (1972) 7
Mahaley v. Cuyahoga Metropolitan Housing Authority, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975) 1
Mayor of the City of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974) 6
Metropolitan Housing Development Corporation v. Village of Arlington Heights, 373 F. Supp. 208 (N.D. Ill. 1974) 8, 9, 10
Metropolitan Housing Development Corporation v. Village of Arlington Heights, 517 F.2d 409 (7th Cir. 1975) 11, 18
The New York Times Company v. Sullivan, 376 U.S. 254 (1964) 15
Olmstead v. United States, 277 U.S. 438 (1928) 18
Pennekamp v. Florida, 328 U.S. 331 (1946) 15
Reid v. Covert, 354 U.S. 1 (1957) 19
Rizzo v. Goode, ... U.S. ....., 96 S. Ct. 598 (1976) 6
Rockbridge Associates, Ltd. v. Pruitt, 341 F. Supp. 703 (N.D. Ga. 1971), *affd. en banc*, 491 F.2d 5 (5th Cir. 1974), *cert. denied*, 419 U.S. 837 (1974) 8
Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974) 10
Shapiro v. United States, 335 U.S. 1 (1948) 15

Snyder v. Massachusetts, 291 U.S. 97 (1934) 15
Stoutenburgh v. Hennick, 129 U.S. 141 (1889) 3
United States v. Butler, 297 U.S. 1 (1936) 8
Village of Arlington Heights v. Metropolitan Housing Development Corporation, cert. granted, ... U.S. ....., 96 S. Ct. 560 (1975) 8
Village of Euclid, Ohio v. Ambler Realty Company, 272 U.S. 365 (1926) 10
Walker v. City of Belpre (1967), 14 Ohio App. 2d 17 7
Warth v. Seldin, 442 U.S. 490 (1975) 10
Washington v. Davis, ... U.S. ....., 96 S. Ct. 2040 (1976) 18, 19
Weaver v. Ham, 149 Tex. 309 (1950) 7
White v. Cincinnati (1956), 101 Ohio App. 160 7

Constitutional Provision

United States Constitution, Ninth Amendment 11

Other Sources

AFRICA REPORT at 34-5 (January-February, 1973) 17
BALLENTINE'S LAW DICTIONARY 1156 (3d ed. 1969) 15
BANFIELD, THE UNHEAVENLY CITY (Boston: Little, Brown and Company, 1970) 16, 17
CONGRESSIONAL RESEARCH SERVICE, AN ANALYSIS OF SECTION 235 AND 236 PROGRAMS, at 31 (May 24, 1973) 9
DANZIG, *The Social Framework of Ethnic Conflict in America*, OVERCOMING MIDDLE CLASS RAGE, at 251-3 (Philadelphia: The Westminster Press, 1971) 16
GLAZER AND MOYNIHAN, RACE AND ETHNICITY IN MODERN AMERICA, at 115-123 (Lexington: D.C. Heath Company, 1974) 16

GRISWOLD, THE JUDICIAL PROCESS (New York: The Association of the Bar of the City of New York, 1973) 14, 16
GURR, WHY MEN REBEL, at 186 (Princeton, New Jersey: Princeton University Press, 1970) 13
HOUSING IN THE SEVENTIES, at 4-57 (HUD, 1973) 9
How Busing Failed in Riverside, PSYCHOLOGY TODAY, at 66 (June, 1976) 12
Kristol, Wall Street Journal, at 14 (June 17, 1976) 12
MCCLOSKEY, THE MODERN SUPREME COURT, at 343 (1972) 14
MOUSNIER, PEASANT UPRISINGS IN SEVENTEENTH CENTURY FRANCE, RUSSIA AND CHINA, at 330 (New York: Harper and Row, 1967) 13
PRALL, THE AGITATION FOR LAW REFORM DURING THE PURITAN REVOLUTION, 1640-1660 (The Hague: Martinus Nijhoff, 1966) 14
Rule 42-4, Rules of the Supreme Court of the United States 1
SMITH, THE RUSSIANS, at 77 (New York: Quadrangle, 1976) 11
Sowell, *A Black "Conservative" Dissents*, NEW YORK TIMES MAGAZINE, Aug. 8, 1976 17
UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (Chapel Hill: The University of North Carolina Press, 1960) 14
Washington Post, at A1 and A3 (August 12, 1976) 14

Supreme Court of the United States

October Term, 1976
No. 75-1002

JOSEPH SKILKEN AND COMPANY, *et al.*,
Petitioners,
vs.
CITY OF TOLEDO, OHIO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE, CITY OF PARMA, OHIO

INTEREST OF AMICUS CURIAE

This *amicus curiae* brief is being filed pursuant to Rule 42-4 of the Rules of the Supreme Court of the United States by the City of Parma, Ohio, a political subdivision of the State of Ohio, and is sponsored by its authorized law officer, the City Solicitor.

Parma was named a defendant in three separate federal court suits involving issues similar to those presented in the case at bar. Two of the actions resulted in judgments in favor of Parma and the Court denied certiorari.[1]

1. *Mahaley v. Cuyahoga Metropolitan Housing Authority*, 500 F.2d 1087 (1974), *cert. denied*, 419 U.S. 1108 (1975); *Cornelius v. City of Parma, Ohio*, 374 F. Supp. 730 (N.D. Ohio 1974), *cert. denied*, March 8, 1976 (No. 75-1012).

As this brief is being written, the third suit is pending in the District Court.[2] Although that pending action is factually distinguishable from the case at bar, and Parma has raised numerous defenses in addition to the issues herein presented for review, Parma's contentions have been strengthened by the Court of Appeals' decision in this case. Parma therefore has a vital interest in respectfully urging affirmance of the judgment of the Court of Appeals for the Sixth Circuit.

SUMMARY OF ARGUMENT

When the District Court exceeded its authority and ordered the City Council of Toledo, Ohio to pass a spot-zoning ordinance (to benefit a private builder seeking to build higher density, low-cost public housing in an area zoned for private residences) and also tried to treat this zoning litigation like a school desegregation case and ordered the "desegregation" of the entire city, the Court of Appeals for the Sixth Circuit properly instructed the District Court that it possessed neither legislative nor administrative power and was eminently correct in reversing the lower court's decision.

Federal Courts do not sit as super-legislatures, and federal judges are not authorized to legislate social policy on the basis of their own personal inclinations, but should exercise judicial self-restraint. There are limits to what a freedom-loving people, not broken in from birth to the ways of dictatorships, will tolerate from federal courts making essentially political decisions, especially when those decisions evidence a lack of understanding of the

2. Parma has filed a motion for summary judgment and is awaiting a ruling thereon.

realities of urban life and, in violation of Our Federalism, invade areas of concern constitutionally entrusted to the States and to the people.

There is no basis for the exercise of federal court authority in the mere fact that people of the same race or ethnic grouping congregate in their own separate residential areas. Proof of a discriminatory racial purpose is necessary to make out an equal protection violation. When, as here, there is no constitutional violation, a federal court should not concern itself with local legislative or administrative decisions.

ARGUMENT

Federalism Is a Cardinal Principle of Our System of Government

It is a cardinal principle of our system of government that local affairs shall be managed by local authorities, and general affairs by the central authority. *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889).

Justice Black, in *Karr v. Schmidt*, 401 U.S. 1201, 1203 (1971) stated:

> Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs.

Federal courts do not sit as super-legislatures. *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 423 (1952); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963); *Griswold v. State of Connecticut*, 381 U.S. 479, 482 (1965). Nor

do they sit to determine whether a particular housing project is or is not desirable, for it is within the power of the legislature to determine that the community should be beautiful, spacious, and well-balanced. *Berman v. Parker,* 348 U.S. 26, 33 (1954).

We have a government of limited powers, and those limits pertain to the Courts as well as to Congress and the Executive. *Holtzman v. Schlesinger,* 414 U.S. 1304, 1315 (1973) (Justice Marshall).

It is the responsibility of federal courts and federal judges to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of their own personal inclinations. *Evans v. Abney,* 396 U.S. 435, 447 (1970).

The Court held in *Ferguson v. Skrupa,* 372 U.S. 726, 729 (1963), that "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation", and further held, at 730, that "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, which are elected to pass laws."

In *Lane County v. Oregon,* 74 U.S. (7 Wallace) 71, 76 (1868), the Court held:

> The people of the United States constitute one nation, under one government, and this government, within the scope of the powers with which it is invested, is supreme. On the other hand, the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in

union there could be no such political body as the United States.

Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the necessary existence of the States, and, within their proper spheres, the independent authority of the States, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the national government are reserved. The general condition was well stated by Mr. Madison in the Federalist, thus: "The Federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designated for different purposes."

Thus, within a short time after the nation was agonized by a civil war fought to preserve the Union, the Court eloquently affirmed the independence of the States within their sphere of authority. This principle is summed up in the term "Our Federalism", and is the foundation of our government.

Within a unitary court system, the principle of separation of powers governs the relations between the tripartite branches, and the authority of courts to intrude into the operations of the other branches is severely restricted. When, as here, the emphasis shifts to a determination of the authority of a federal court to intrude into the sphere

of activity of legislative and administrative bodies within a State, that doctrine's rationale applies as well to the delicate issues of federal-state relationships underlying this case."[3] When the frame of reference moves from a unitary court system to a system of federal courts "representing the Nation, subsisting side by side with 50 state judicial, legislative, and executive branches, appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, ... U.S. ....., 96 S. Ct. 598, 608 (1976).

Sixth Circuit Court of Appeals' Decision Was Eminently Correct

This is precisely what the Sixth Circuit Court of Appeals did. It applied long-established and well-grounded constitutional principles, and a large measure of common sense, in reversing the erroneous decision of the District Court. The District Court had no authority to order members of the City Council to pass a new zoning ordinance or to "desegregate" the City of Toledo, and its attempt to do so was a raw misuse of judicial power which was properly nullified by the Court of Appeals.

This litigation was not instituted to vindicate any rights of minorities to acquire existing housing allegedly denied to them because of their race. Rather, the real purpose of the suit was to obtain a spot-zoning change and platting approval for Joseph Skilken and Company, a private, profit-making builder. There was no showing that the individual plaintiffs would actually purchase the housing units if built, or that they could claim a prefer-

3. *Mayor of the City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 (1974).

ence over prospective nonminority purchasers of the proposed housing units without violating federal and state antidiscrimination laws. In reality, the suit was for the immediate benefit of Skilken. There is no constitutional guarantee of access to dwellings of a particular quality.[4]

No one has a constitutional right to spot zoning, either. Rather, as the leading case of *Weaver v. Ham*, 149 Tex. 309 (1950), held in Syl. 4:

> Where a city has by its basic zoning ordinance declared a certain portion of that city to be in Zone A, or a residential district, an amendatory ordinance changing a named block in said district to Zone D, or apartment house district, constituted unjustifiable "spot zoning", and was, therefore, void.

The rationale of the *Weaver* case, prohibiting such unjustifiable spot zoning, has been adopted in Ohio. See *White v. Cincinnati* (1956), 101 Ohio App. 160; *Walker v. City of Belpre* (1967), 14 Ohio App. 2d 17.

Moreover, there are ample administrative and judicial remedies under Ohio law if Skilken desired to claim its rights were being violated. See *Driscoll v. Austintown Associates* (1975), 42 Ohio St. 2d 263. If every builder or real-estate speculator could seek to be free of the constraints of local building and zoning ordinances and avoid State administrative and judicial proceedings by the device of joining nominal minority plaintiffs and filing suit in federal court, the floodgates of litigation would be opened. Anytime any builder did not get his way when seeking to build any kind of housing, or even a motel or restaurant or factory, the National Committee Against Discrimination in Housing, or similar group, could recruit minority persons

4. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

to become nominal plaintiffs to allege their rights to potential housing or public accommodations or jobs were being violated, even though the majority of persons would be equally so deprived if the construction did not go forward. However, federal courts are courts of limited jurisdiction. "It is not their function to serve merely as a zoning appeal board. The individual merits of local zoning matters are appropriately left to the sound discretion of local zoning authorities." *Rockbridge Associates, Ltd. v. Pruitt,* 341 F. Supp. 703, 705 (N.D. Ga. 1971), *affd. en banc,* 491 F.2d 5 (5th Cir. 1974), *cert. denied,* 419 U.S. 837 (1974).

Justice Stone, in the oft-quoted language of his dissent in *United States v. Butler,* 297 U.S. 1, 79 (1936), cogently observed that "while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint." The Court of Appeals exemplified the quintessence of judicial self-restraint in reminding the District Court that it possessed only adjudicative but not legislative or administrative power.

Petitioners' Reliance on Village of Arlington Heights v. Metropolitan Housing Development Corporation Is Misplaced

Petitioners rely heavily on *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* No. 75-616, pending in this Court on a writ of certiorari. Their reliance on that case is misplaced. The District Court[5] properly entered judgment for the municipality and its officials, but although the Court of Appeals for the Seventh Circuit did not rule that any of its findings

5. *Metropolitan Housing Development Corporation v. Village of Arlington Heights,* 373 F. Supp. 208 (N.D. Ill. 1974).

were clearly erroneous, the Court of Appeals reversed the District Court's well-reasoned judgment.

In that case, suit was instituted to force Arlington Heights to order a spot-zoning change for a 15-acre tract of land, to permit a multi-family attached residence use (such as apartments) in an area zoned for and consisting of single-family detached residences.

The project that the corporate plaintiff wanted to construct in the single-family residential zone was to have been financed under Sec. 236 of the National Housing Act of 1968. At the time the District Court's decision was rendered, the President had imposed a moratorium on funding Sec. 236 projects. Those projects had come under severe criticism for serious deficiencies, excessive costs, and limited benefits.[6] As the District Court observed, the spot rezoning would stand and be well-nigh irreversible even though the project is not built, "and many varieties of buildings could then be constructed by the legal owners in the midst of the existing single-family residential area."[7] If Metropolitan could build what it wanted in the midst of a single-family residential area, any property owner could build apartments there with the inevitable consequence that those "apartment houses, which in a different environment would not only be un-

6. See *e.g.* the HUD publication HOUSING IN THE SEVENTIES (1973) (esp. pp. 4-57 for a summary of ten critical findings against Sec. 236 projects). The report of the Congressional Research Service of the Library of Congress for the Senate Committee on Banking, Housing and Urban Affairs entitled AN ANALYSIS OF SECTION 235 AND 236 PROGRAMS (May 24, 1973) pointed out that while nonprofit sponsors had accounted for 28% of Sec. 236 projects they accounted for 67% of the projects in financial difficulties (p. 31).

7. 373 F. Supp., at 211.

objectionable but highly desirable [would] come very near to being nuisances."[8]

As in Ohio, Illinois courts hold that a change of zone applicable to only a small area, and a change which is out of harmony with comprehensive planning for the good of the community as a whole, constitutes illegal spot zoning.[9] Also like Ohio, Illinois provides ample State administrative and judicial procedures for deciding zoning matters, which are in the last analysis the epitome of a local rather than a federal concern.

The District Court specifically found that the three individual plaintiffs did not represent a class, and held plaintiffs did not prove discrimination against racial minorities as distinguished from the underprivileged generally. The lack of housing for low earners in the suburban area affects the entire group, not merely blacks or Mexican-Americans.[10]

This Court held in *Warth v. Seldin*, 422 U.S. 490, 508 (1975), that "Absent the necessary allegations of a demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the Court's ruling would be applied.' *Schlesinger v. Reservists to Stop the War*, 418 U.S., at 221-222."

With one judge dissenting, the Court of Appeals, speaking through Judge Swygert, assumed the role of a superlegislature to alleviate the problem it saw in "de facto

8. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

9. *Duryea v. City of Rolling Meadows*, 119 Ill. App. 2d 445 (1970).

10. 373 F. Supp., at 210.

segregated housing", and accused Arlington Heights of "exploiting the problem *by allowing itself to become an almost one hundred percent white community.*"[11] (Emphasis added.) There was no citation of authority for that remarkable *ipse dixit*.

What was left unsaid by Judge Swygert is equally mind-boggling. How should a community proceed to prevent "allowing itself to become an almost one hundred percent white community"? Should it erect an "Arlington Heights Wall", to become as infamous as the "Berlin Wall", including barbed wire and itchy-fingered armed guards to prevent determined whites (exceeding some arbitrary quota) from attempting to take up residence in the community?

How could any community constitutionally require white persons, who desire to terminate their constitutional right to travel by residing in that community, to keep on travelling? And what if alternate destinations are also "over quota" for whites? Municipal officials do not assign their residents to particular housing units within the community, nor do they build the housing, unlike school authorities who built schools and assigned pupils to their neighborhoods schools. Government officials have no constitutional or legal authority to tell Americans where to live. A man's home is his castle, and surely his right to choose it freely is one of the unenumerated rights reserved under the Ninth Amendment.

Behind the Iron Curtain today, people must carry identity cards and permits dictating in what community they may live.[12] That may be one method of attempting to enforce a "desegregation" order against the entire popu-

11. 517 F.2d 409, 414.

12. HEDRICK SMITH, THE RUSSIANS 77 (New York: Quadrangle, 1976).

lation, as District Judge Young attempted to do in the case at bar before he was advised of the limits of his authority by the Court of Appeals for the Sixth Circuit, and of policing a federally-imposed municipal policy of not "allowing itself to become an almost one hundred percent white community". But would such regimentation be tolerated by the American people, devoted to the concept of freedom and not broken in from birth to the ways of dictatorships?

True, there have been instances when people in America have been forced to move against their wills. But most Americans today regard with a sense of shame the herding of the native Americans, whose skin color was red, to reservations, and forcing others, whose skin color was yellow, from their homes in California. Hopefully, no American today, whether considered "white" or "black" or "yellow" or "red" would accept with docility such a forced migration, or one as that depicted so poignantly in *Fiddler on the Roof*. Yet, as with forced busing of school children, lower federal courts seem to know of no other way to "desegregate", ultimately, except by enforcing quotas through movement of bodies.[13] While concern for

13. In his perceptive article in The Wall Street Journal of June 17, 1976 (p. 14), Professor Irving Kristol discusses how the persistence of lower federal courts in continuing to order forced busing in the face of overwhelming evidence that it just doesn't work (either to maintain the set quota, or in improving educational achievement, or in fostering racial harmony) is explicable as an example of "cognitive dissonance"—the phenomenon whereby people who believe strongly in a set of ideas will tend to reaffirm those ideas most vigorously at the very moment when they are repudiated by reality. Busing doesn't work to improve achievement even when voluntary and has community support. See *How Busing Failed in Riverside* in the June 1976 issue of PSYCHOLOGY TODAY, pp. 66 ff. The problem should not be compounded by extending the discredited ordering of forced busing to ordering forced housing. The cry is often heard that refusal to extend coercive decrees (that do not produce the intended desired results in the field of schooling) to other areas, such as housing, would be a "step backward". But it would be prudent to "step backward" rather than to step forward and fall off a cliff.

the safety of children has, with some notable exceptions, resulted in resentful but relatively nonviolent acceptance of forced busing, it is submitted that the more drastic and all-embracing type of people-movement, which forced residential-allocation would ultimately and ineluctably require, would not be tolerated in this land of the free. The fascinating study of what causes people to rebel bears this out:

> If a highly legitimate regime imposes a policy that substantially violates popular expectations about what the regime should do, people are motivated to protest the policy not only because of the direct deprivation it imposes but because it is inconsistent with their image of the regime. If the regime resists pressure to change through normal channels, participatory RD [relative deprivation] may increase to the point at which demonstrative violence occurs, directed against both the policy and the incumbents who imposed it. As a last resort, intensely discontented citizens may feel that a highly legitimate political unit can be preserved only by violent opposition to both incumbents and institutions which are acting in an improper, i.e. illegitimate way.[14]

14. TED ROBERT GURR, WHY MEN REBEL 186 (Princeton, New Jersey: Princeton University Press, 1970). Studies of popular uprisings and revolts throughout history reveal a recurring cause: governments which seek to reduce all to uniformity and equality "in the service of the state, riding roughshod over local privileges and traditional liberties . . . [and raising] the hackles of entire groups of people when they were confronted with the coldness of the law, of these impersonal decisions handed down from afar, by persons who were unknown to them or merely names . . . Without intending it, probably, but pushed forward by jurists who were imbued with ideas of equality and 'reasons of state' . . . [government officials] were carrying forward a slow revolution which made many people feel something like the cold hand of death upon them and provoked violent reactions." ROLAND MOUSNIER, PEASANT UPRISINGS IN SEVENTEENTH CENTURY FRANCE, RUSSIA, AND CHINA 330 (New York: Harper & Row, 1967). For

(Continued on following page)

Political Decisions Invite Political Reaction

In his penetrating essay, THE JUDICIAL PROCESS,[15] Dean Erwin N. Griswold reflects on the abuses of unrestrained incursions of the judiciary into areas traditionally reserved to the popular branches of government:

> If the courts take on more and more of the basic decisions of operating the government, then obviously they become more and more involved in what are essentially political decisions, of the sort that have traditionally been made by the legislative or executive branches of the government. Whatever else may be said for this, it is not the democratic way. Indeed it tends to be quite undemocractic, and there may be some who feel that some of the results are reached because the judiciary do not really trust or favor the democratic process . . . In any event, "modern judicial policies" which "seek to push the United States along the paths of virtue"[16] inevitably involve the courts more and more in essentially political decisions, which then invite and indeed require political reaction.

Judges who assume political roles are therefore subject to the same "uninhibited, robust, and wide-open" debate,

---

Footnote continued—
historical studies of popular reactions against the law and courts in the context of revolutions, see CARL UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (Chapel Hill: The University of North Carolina Press, 1960); STUART E. PRALL, THE AGITATION FOR LAW REFORM DURING THE PURITAN REVOLUTION 1640-1660 (The Hague: Martinus Nijhoff, 1966). More recently, coal miners in West Virginia and surrounding areas engaged in a wildcat strike to protest their grievances against federal court orders (Washington Post, Aug. 12, 1976, pp. A1 and A3).

15. New York: The Association of the Bar of the City of New York, 1973, at 28-29.

16. ROBERT G. MCCLOSKEY, THE MODERN SUPREME COURT 343 (1972).

that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks".[17]

Justice Cardozo understood that "A fertile source of perversion in constitutional theory is the tyranny of labels",[18] and Justice Frankfurter taught that "It is the part of wisdom, particularly for judges, not to be victimized by words",[19] for there is "a tendency . . . whereby phrases are made to do service for critical analysis by being turned into dogma."[20]

Judges who seem to have an *idée fixe* about the term "segregation" come to aberrant conclusions about the role of the judiciary in a free society and its ability to solve delicate problems intrinsic to human relations. The term "segregation" originally meant "An enforced separation of races, particularly the white and colored races, as under statutes and constitutions providing for the separate education of colored and white children." BALLENTINE'S LAW DICTIONARY (3d Edition) 1156. In school cases, the modifiers *"de jure"* and *"de facto"* were added to delineate situations wherein judicial remedies may be appropriate, and those wherein no judicial intervention is warranted.

To apply the term "segregation" to the existence of racial concentrations in urban residential areas is both misleading and productive of fuzzy thinking, for it begs the question and ignores the element of free choice of residences. Its use is one of the worst examples of the mischief caused by the phenomenon sometimes called "incrementalism", or, as described by Dean Griswold, a process whereby "a sort of decisional leapfrogging takes over

---

17. *The New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964).

18. *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934).

19. *Shapiro v. United States*, 335 U.S. 1, 56 (1948).

20. *Pennekamp v. Florida*, 328 U.S. 331, 352 (1946).

as a principle expands: the first decision is distilled from the language of the Constitution, but the next expansion begins from the reasoning of the last decision, and so on down the line until we reach a point where the words of the Constitution are so far in the background that they are virtually ignored."[21]

When judges see residential concentrations only in terms of a "two-class theory", i.e. black and white,[22] they reveal a lack of understanding concerning the realities of urban life. As the eminent urbanologist, Professor Edward C. Banfield, pointed out in his classic work,[23] "In every large city ethnic groups of the second, third, fourth and even later generations—Irish, German, Scandinavian, Polish, Jewish, and Italian, among others—lived in self-imposed isolation and sent their children to schools that were to a high degree homogeneous."[24]

---

21. THE JUDICIAL PROCESS, *supra*, at 19.

22. *Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

23. THE UNHEAVENLY CITY, 81 (Boston: Little, Brown and Company, 1970).

24. There are numerous recent books and articles discussing renewed ethnic and religio-ethnic awareness, and the natural congregation of like with like. For example, David Danzig in his article entitled *The Social Framework of Ethnic Conflict in America*, in OVERCOMING MIDDLE CLASS RAGE, 251-253 (Philadelphia: The Westminster Press, 1971) says "The widespread existence of such subcommunities and their importance have made our society vastly more complex than our ideas of town-hall democracy would allow us to believe. In one set of circumstances we strive to live up to the principle 'regardless of' race, color and creed; in other circumstances *race, color,* and *creed* are the very principle by which human relationships are organized. Gunnar Myrdal in my view failed to understand American society when he assumed that this contradictory behavior reflected a moral dilemma. On the contrary, this is the accepted differentiated structure of our social order."

In their article entitled *A Resurgence of Ethnicity?* by Nathan Glazer and Daniel Patrick Moynihan in RACE AND ETHNICITY IN MODERN AMERICA, pp. 115-123 (Lexington: D.C. Heath Company, 1974), the authors point out that "Just as blacks now want to gather together in distinctive institutions where they can strengthen specifically black social, cultural, and political tendencies, so do other groups".

In the same work, Banfield[25] points out that like everyone else, blacks prefer to live among people whose class culture is not very different from their own, and he warns that the "practice of calling all Negro neighborhoods 'segregated' and 'ghettoes' misrepresents the situation seriously and perhaps dangerously." He further deplores the semantic confusion arising from labelling all-black neighborhoods "segregated", without taking into account such factors as immigration of large numbers of unskilled Negro workers into urban areas and occupying all the low-cost housing then available, as well as their own neighborhood preferences. Roy Innis, leader of CORE, is an articulate spokesman for the view of some black leaders that, at least for a time, separatism is as useful and natural for many blacks as it is for other ethnic groups.[26] Moreover, court-ordered, forced dispersal of blacks from areas in which they are concentrated would severely dilute the political gains made through election of black public officials from such districts and the ability to control their own institutions.

Thus, it is not a simple matter of "black and white"; there are many gray areas with respect to understanding the social and psychological aspects of residential housing patterns.

Courts are not as competent as are the political branches to attempt to ameliorate intractable social problems, and court orders tend to be rigid, doctrinaire, and the very antithesis of democracy. For example, the District Court issued a "desegregation" order which would of necessity have affected the majority population of Toledo as well as the minority, but refused to allow inter-

---

25. *Ibid.* pp. 79-87.

26. See, *e.g.* Interview, in AFRICA REPORT, January-February, 1973, 34-35, comparing blacks with Jews. See also, Thomas Sowell, *A Black "Conservative" Dissents*, NEW YORK TIMES MAGAZINE, Aug. 8, 1976.

vention by persons most to be affected by the real purpose of the suit. "Integration" is not commanded by the Constitution. Due Process is. In both *Skilken* and *Arlington Heights*, suits to benefit builders were expanded beyond the narrow issues of the actions to involve novel issues and to set new precedents not contemplated by the issues raised by the parties. Even if the decisions rendered by the District Judge in *Skilken* and by the Court of Appeals in *Arlington Heights* were the products of the purest motives and not the exercise of raw judicial power, "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[27]

CONCLUSION

Although the District Court treated this action (to obtain a spot-zoning change) like a school desegregation case, it failed to apply "the basic equal protection principle that the invidious quality of a law must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is 'a current condition of segregation resulting from intentional state action . . . the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate.' *Keyes v. School District No. 1*, 413 U.S. 189, 205, 208 (1973). See also *id.*, at 199, 211, 213." *Washington v. Davis*, ... U.S. ....., 96 S. Ct. 2040, 2048 (1976).

---

27. Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

In the case at bar, the District Court inferred that the refusal to spot zone would have a disproportionate racial impact, but that was only conjecture. However, *Washington v. Davis*, 96 S. Ct., at 2050, clearly teaches that proof of discriminatory racial purpose is necessary to make out an equal protection violation. Therefore, the decision of the Court of Appeals for the Sixth Circuit was eminently correct and should be affirmed. The Court of Appeals correctly applied the law enunciated by the Court, upheld the vital principles of Our Federalism, and promoted democratic principles and the concept of liberty. "Ours is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny." *Reid v. Covert*, 354 U.S. 1, 40 (1957).

Respectfully submitted,

ROBERT R. SOLTIS
Special Counsel
Parma City Hall
6611 Ridge Road
Parma, Ohio 44129
(216) 886-2323
Attorney for Amicus Curiae

Sponsored By:

ANDREW BOYKO
Solicitor, City of Parma, Ohio
Authorized Law Officer